RASIDIN BIN PARTORJO v. FREDERICK KIAI

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) August 24, 1976]

[Kuching — Federal Court Civil Appeal No. 9 of 1976]

Tort — Negligence — Damages — Principles upon which appellate court will interfere with award of trial judge — Loss of earning capacity — Interest on damages — Rules of the High Court in Borneo, 1963 Order 40, rule 11(2) — Civil Law Act, 1956, s. 28A.

Practice and Procedure — Principles upon which appellate court will interfere with award of trial judge.

This was an appeal from the decision of the High Court in which judgment was given for the respondent for damages for injuries sustained in an accident in which the motor-cycle ridden by the respondent collided with the motor-cycle ridden by the appellant.

Held: (1) it would be wrong for the appellate court which had not seen or heard the witnesses to substitute its own finding of fact for that of the learned trial judge;

(2) on an appeal against the damages awarded, the appellant had to convince the appellate court that the learned trial judge had acted on a wrong principle of law or had misapprehended the facts or had for other reasons made a wholly erroneous estimate of the damage suffered;

(3) the learned trial judge should have given damages for loss of earning capacity rather than for loss of future earnings but in the absence of definite evidence, the court had to arrive at some fair figure. In the circumstances the damages for loss of earning capacity should be $42,660 less income tax;

(4) the awards for pain and suffering and for loss of amenities should not be interfered with;

(5) interest was payable on the damages under Order 40 rule 11(1) of the Rules of the High Court in Borneo, 1963.

Cases referred to:-

(1) *Baker* v. *Market Harborough Industrial Co-operative Society* [1953] 1 W.L.R. 1472.

(2) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601 at pp.616-617.

(3) *Admiralty Commissioners* v. *S.S. Susquehanna* [1926] A.C. 655, 661.

(4) *Admiralty Commissioners* v. *S.S. Valerie* [1922] 2 A.C. 242, 248.

(5) *Ashcroft* v. *Curtin* [1971] 1 W.L.R. 1731.

(6) *Daniels* v. *Jones* [1961] 1 W.L.R. 1103, 1109.

(7) *Khoo See Moy* v. *Tay Teik Tang* [1970] 2 M.L.J. 249.

(8) *Fletcher* v. *Autocar & Transporters Ltd.* [1968] 1 All C.R. 726.

(9) *Watson* v. *Powles* [1967] 3 All E.R. 721.

(10) *Fairley v. John Thompson (Design and Contracting Division) Ltd. The Times*, Feb. 9, 1973.

(11) *Jefford* v. *Gee* [1970] 2 W.L.R. 702.

FEDERAL COURT.

H. Elias (*Ee Poh Teik* with him) for the appellant.

M. Chan for the respondent.

Wan Suleiman F.J.: On August 12, 1969, two motor cycles Nos. KA 3048 and KA 8645 collided at the 40th mile Serian-Simanggang Road, Kuching. The plaintiff, respondent before us, was riding pillion on the first motor cycle, and the defendant, appellant before us, was the rider of the second motor cycle.

The plaintiff sued the defendant for damages for personal injuries suffered by him. He did not sue the driver of the motor cycle on which he rode pillion.

The defendant however brought in that rider as a third party, claiming an indemnity and contribution in respect of the claim by the plaintiff. The defendant said that the third party was himself to blame for the accident. The third party did not appear and the defendant on October 4, 1971, obtained an order against him for indemnity and contribution in respect of the whole of the claim by the plaintiff against the defendant.

The learned judge had before him two conflicting versions given by witnesses for the plaintiff on the one hand and by witnesses for the defendant on the other.

The learned judge found that the stretch of road where the accident occurred was tarred only in the middle, that the tarred part was 8 feet wide, enough to accommodate only one motor car or two motor cycles, that the accident occurred in the middle of the tarred section and applying the test in *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.*(1) held that both motor cyclists were equally to blame.

I am of the opinion that the appeal against the judge's finding that both motor cyclists were to blame should be dismissed. The evidence in support of each party's version was purely oral. It cannot be tested by independent evidence such as to be found in a police sketch plan (which by the time of the trial had been destroyed). The learned trial judge preferred the plaintiff's version to that of the defendant's, and in these circumstances, it would be wrong of us who have not seen or heard the witnesses, to substitute our own finding for that of the learned trial judge.

I now turn to the appeal against damages.

At the time of the accident the plaintiff aged 40 was an officer in the Agricultural Department, Sarawak, on secondment to the Trivoh Land Development Scheme as Scheme Manager. He joined the department in 1961 and has been working in several land development schemes before being appointed Scheme Manager. His salary was $800 plus $60 charge allowance per month. He continued to receive this salary and allowance up to March 8, 1971 when he was boarded out of the service on a monthly pension of $187.86.

Within a few hours of the accident he was admitted to the General Hospital, Kuching suffering from multiple small abrasions and a fissure fracture of the left side of the vault of the skull.

On the following day Dr. Ting performed two operations to remove blood clot on the left side of the brain to save the plaintiff's life. The plaintiff remained in a semi-comatose state for some days and only on September 20, 1969 did he seem to be reasonably clear and alert mentally. On October 18, 1969, he was finally discharged but continued to have monthly check-ups. He was sent to the Neurosurgical Hospital, Kuala Lumpur for some time. On his return from Kuala Lumpur he was admitted to the Lau King Howe Hospital, Sibu. After that he continued to have monthly check-ups at the Bintulu Hospital. The monthly check-ups continued until 1972. The last medical examination on the plaintiff

was made on September 9, 1975 (the trial of this suit began on September 24, 1975) by Dr. Ting Ing Kiet.

The doctor's report said:

"Generally he appears quite well but is slightly slow in answering questions. Many of his symptoms remain. He sleeps poorly (three to four hours). He still complains of feeling giddy particularly on getting up, accompanied by headache and backache. His memory is poor and he cannot concentrate too well — e.g. can only read for about 10 minutes. He has double vision with some trouble fixing his left eyeball on looking sideways. He has however reasonably normal visual acuity for both eyes. There is residual weakness of his eye muscles (as mentioned by Mr. Cumming Smith). He has no memory of events up to several days before and after the accident. The other obvious finding is the old craniotomy scar and defect in the left temporal region of his head.

My opinion is that his condition has stabilised by now and not much further improvement can be reasonably expected."

At the time of the trial the plaintiff was 44.

The learned trial judge awarded damages totalling $89,430 being (A) general damages totalling $71,100 as follows:

(1)	For pain and suffering	$ 3,500
(2)	Loss of amenities and other disadvantages arising from disabilities	18,000
(3)	Loss of future earnings	49,600

and (B) special damages of $18,330.

In this appeal the defendant argues that the damages are too high. In brief he argues that the total damages should be reduced by $37,130 to $52,300 made up as follows:

1.	pain and suffering and of amenities loss	$14,000
2.	earning capacity	20,000
3.	special damages	300
4.	loss of earnings	18,000
	Total	52,300

A Court of Appeal always starts with the working presumption that any decision appealed against is right in every respect. So to succeed in an appeal the appellant must convince us that the decision appealed from is wrong. If we are not so convinced, the appeal fails.

The principle upon which an appellate court will interfere with an award of damages made by a judge sitting alone has been stated by Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ltd.*[2] at pages 616-7 as follows:

"Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint* v. *Lovell*. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

Thus the appellant here has to convince us that the learned trial judge has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damage suffered.

The principle for assessing damages has been stated by Viscount Dunedin in *Admiralty Commissioners* v. *S.S. Susquehanna*[3] as follows: —

"the common law says that damages due . . . for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act. . . ."

Viscount Dunedin expressed the same principle in the following passage from *Admiralty Commissioners* v. *S.S. Valeria*:

". . . in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do, the loss which he has suffered as the natural result of the wrong done to him."

Mr. Elias concedes that the amount awarded as special damages in the court below was fair though the learned trial judge, as would appear from his judgment was unaware of the amendment to the Civil Law Act, 1956 (the new section 28A) whereby pensions payable to the respondent shall not be taken into account in assessing damages.

However the remaining items came under attack. As I have mentioned earlier, it was urged that the combined award for pain, suffering and loss of amenities should have been $14,000, and that for loss of earning capacity (and not as the learned judge put it, for "future loss of earnings"), should be scaled down to $20,000. Counsel argued that the judge should have given damages for *loss of earning capacity* and not for loss of future earning. He cited a passage from the 4th Edition of *Kemp & Kemp* at pages 121/122 which reads as follows: —

"There must be evidence on which the court can find that the plaintiff will suffer future loss of earnings, it cannot act on mere speculation. If there is no satisfactory evidence of future loss of earnings, but the court is satisfied that the plaintiff has suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for future loss of earnings."

It was urged upon us that in arriving at a figure of "$300 or more" a month, the learned trial judge was merely speculating as to what the respondent could have got from employment after the accident.

This is what appears in the grounds of judgment: —

"The plaintiff is 44 years old and in the normal circumstances he will be able to work until the age of 55. I agree with counsel for the plaintiff that after deducting 2 years for other contingencies and incidents of life there is still 9 years purchase. According to the specialist Mr. P. R. Sengupta, the plaintiff can work as a padi planter and do other manual work. The plaintiff appears to me to be a healthy looking middle-aged person. He did not have any trouble in answering questions put to him by his own counsel as well as counsel for the defendant. With his many years' experience as an Agricultural Officer I think there is possibility that he can get employment that would give him an income of $300 or more a month. His loss of future earning should therefore be calculated on a rough basis of $500 per month over a period of 9 years purchase. I assess the plaintiff's prospective loss of earnings by reason of the injuries and incapacity he has suffered after deducting income tax as $49,600."

It would be helpful to consider in greater detail evidence which will assist us to decide whether the learned trial judge had been merely, to borrow an expression used by Edmund Davies L.J. in *Ashcroft* v. *Curtin*[5] (C.A.), "plucking a figure from the air"

I would give the evidence of the specialist Mr. P.R. Sen Gupta the same respect in which it was obviously held by the learned trial judge, though I am setting down in some greater detail such evidence as should bear upon the possibilities of respondent obtaining alternative employment. Not only did this specialist examine the respondent on September 6, 1975, but he was also a member of the Medical Board and examined him for the purposes of that Board on March 8, 1971 in consequence of which the respondent was "boarded out" from the Government service. The reason for that decision was, according to Mr. Sen Gupta, that "he would not be fit for undertaking any responsible job which required concentration, memory and alertness and also because of bad vision". This brain damage has also caused him to have double vision when he looked to the left. Again, on the subject of respondent's capacity to perform work, he said, "I would feel that he could perform any jobs involving manual rather than paper work. I hesitate to recommend him as a clerk. I would not recommend him as a survey assistant or agricultural assistant".

On further cross-examination he added —

"Normally, after severe injury, it is not my practice to recommend such a patient to drive a public vehicle. I would not recommend him to do wharfing work except in Company. No trouble as a padi planter."

Though the respondent himself said words to the effect that he was unsuitable for any sort of employment (see page 57 of the record), and did not agree with Mr. Sen Gupta that he was able to plant padi giving as reason that such activity would make him giddy, adding that he had tried to find some work but could not get any light jobs, one may well expect a person bent on getting maximum possible damages, to exaggerate his disability. Mr. Sen Gupta was emphatic that manual work such as planting of padi would be well within his capacity. His capacity for work, be it be noted, like his physical condition generally, would, said this specialist, remain static *i.e.* would not improve or deteriorate any further. Also one should not forget that he was otherwise a healthy person.

We have no evidence to show how much padi planting would pay if the respondent were to resort to such manual employment. Nor is there evidence that with his many years experience as a Agricultural Officer the possibility of his getting some employment which would benefit by his previous experience as such could bring him an income of $300 or more a month, as the learned trial judge thought he could obtain.

I would refer again to the case of *Ashcroft* v. *Curtin, supra* the facts of which are as follows: —

"The plaintiff was a skilled precision engineer who carried on a successful business through a private company, of which he was the active managing director. He kept only rudimentary records and the company's accounts were unreliable. He was severely injured in a road accident caused by the defendant's negligence, as a result of which he could not stand noise, suffered from blackouts, vomitting, headaches, loss of balance and became easily tired. His injuries prevented him from working as an engineer and seriously prejudiced him in running the company, which he continued to manage for five years after the accident.

In an action against the defendant claiming damages for pain, suffering and loss of amenities, and for financial loss based on a decline in the company's profitability caused by the plaintiff's impaired efficiency, Donaldson J, awarded £15,500 general damages, of which £5,000 was for pain, suffering and loss of amenities and £10,500 for financial loss.

On appeal by the defendant —

Held, allowing the appeal, that although there was a decline in the company's profitability after the accident which had been caused by the plaintiff's injuries, it was impossible in the absence of reliable accounts to quantify it, and accordingly, the claim for financial loss failed (post, pages 1737F-G, 1738D-E); but that since the plaintiff's capacity to work outside the company was virtually extinguished, he was entitled to damages for the risk of being thrown onto the labour market and being unable to find employment, for which the proper compensation was £2,500 (post, pages 1738H-1739A); and, accordingly, the general damages would be reduced to £7,500."

Whilst I agree with counsel for the appellant that the learned trial judge should have given damages for loss of earning capacity rather than for loss of future earning I remain confronted with the same problem as Edmund Davies L.J. faced in the aforementioned case. Like him I feel loath to arrive at a conclusion that in the absence of evidence we should not arrive at any figure, for that would indeed not meet justice of this case. Arriving at no figure for lack of or insufficient evidence would mean that in the words of Holroyd Pearce L.J. in *Daniels* v. *Jones*,[6] "... arithmetic has failed to provide the answer which common sense demands", and patently common sense tells me that I should arrive at some fair figure.

Indeed Mr. Elias himself did not suggest that because there was lack of evidence there should be no award for loss of earning capacity but suggested that the amount should be reduced by 50%, and he had referred us to the case of *Khoo See Moy* v. *Tay Teik Tang*[7] where damages were awarded for injuries to the brain causing 50% efficiency. Counsel had referred to the injuries suffered by the plaintiff in that case when cross-examining Mr. Sen Gupta at the trial, and under re-examination by Mr. Chan, Mr. Sen Gupta had said that the brain injury in *Khoo See Moy's* case was less serious than in plaintiff's case.

Mr. Elias referred to the case of *Fletcher* v. *Autocar & Transporters, Ltd.*[8] where Denning L.J. at page 734 cited with approval the earlier decision of the Court of Appeal in *Watson* v. *Powles*[9] which reads as follows: —

"there is only one cause of action for personal injuries, not several causes of action for the several items. The award of damages is therefore an award of one figure only, a composite figure made up of several parts....At the end all parts must be brought together to give fair compensation for the injuries."

His Lordship went on to explain that there was considerable risk of error in just adding up the items, there being the risk of overlapping. (From page 734B to page 735E Denning L.J. went into details as to how overlapping was to be avoided in that particular case).

Having come to the view that the learned trial judge was wrong in giving damages under the heading of loss of future earnings, and that damages could only be properly given in this case for loss of earning capacity, I feel that following the Court of Appeal case of *Ashcroft* v. *Curtin, supra* there should never-

theless be given a figure for such loss of earning capacity.

I do not think that the learned trial judge was over-generous in giving a figure of $300 per month as the possible earnings which the injured plaintiff could obtain per month from work of mainly manual character. Any additional earning above what he would normally earn in a purely manual employment would be accounted for by the facts noted by the learned trial judge. His previous skills as an Agricultural Assistant had clearly been taken into account as a factor to boost his potential earnings. His Lordship however misread the actuarial table. The amount awarded under this head should be $42,660 from which the appropriate amount of Sarawak Income tax, to be computed by the learned Registrar, should be deducted.

I must emphasize that I have not overlooked what was said by Denning L.J. and Scarman L.J. in *Fairley* v. *John Thompson (Design and Contracting Division) Ltd.*[10] but I note that the facts there are different.

I do not think that we should interfere with the awards of $3,500 for pain and suffering and of $18,000 for loss of amenities. After all the medical specialist was emphatic that the appellant's brain injuries were more severe than those suffered by Koo See Moi. (See [1970] 2 M.L.J. 249).

Bearing in mind the principle enunciated in *Davies* v. *Powell Duffryn Associated Collieries Ltd., supra* I am not satisfied that these awards are of such magnitude as should justify our interference.

As regards the cross-appeal, Mr. Elias concedes that interest is payable under Order 40 rule 11(2).

There respondent urges that interest on the total award of $89,430 should be awarded to the respondent pursuant to Order 40 rule 11(2) of the Rules of the High Court in Borneo, 1963 or alternatively it should be awarded either on the total or on part thereof pursuant to Order 40 rule 11(1) of the same rules.

This court has on previous occasions followed the recommendations by Lord Denning in *Jefford* v. *Gee*[11] and proposes to do so in this appeal. During the course of the appeal Mr. Elias conceded that the amount awarded as special damages *i.e.* $18,330 was fair.

There shall therefore be an award of interest at the rate of 3% per annum on the sum of $18,330 (special damages) from date of accident till judgment, and on the general damages *i.e.* $3,500 for pain and suffering, $18,000 for loss of amenities and $42,660 less tax for loss of earning capacity there should be paid interest at the rate of 6% per annum from date of service of the writ until judgment. The appeal is dismissed with costs, appellant's deposit to be paid to respondent against taxed costs.

Suffian L.P. and **Lee Hun Hoe C.J. (Borneo)** concurred.

Appeal dismissed.

Solicitors: *Ee, Lim & Leong; Chan, Jugah, Wan Ullok & Co.*

KALIMUTHU v. S. KANDIAH

[F.C. (Gill C.J. (Malaya), Ali and Wan Suleiman F.JJ.)
August 26, 1976]
[Kuala Lumpur — Federal Court Civil Appeal No. 176 of 1975]

Landlord and Tenant — Licensee — Permission given to build house on land — Conditional agreement for sale of land to owner of house — Subsequent sale of land without notice of any equitable rights — Notice to quit given by one of several co-proprietors — Civil Law Act, 1956, s. 28(2).

In this case the respondent's father had been given permission by the then owner of a piece of land to build on a portion of the land and to occupy it subject to payment of ground rent. Subsequently one of the sons of the owner agreed to sell the land to the respondent's father subject to his obtaining letters of administration. On the death of his father the respondent went to live in the house. The appellant subsequently claimed to have purchased the land from the son of the owner and gave notice to quit to the respondent. She then brought an action in the Sessions Court to recover possession. The learned President of the Sessions Court gave judgment for the appellant but an appeal by the respondent to the High Court was allowed, the learned trial judge holding that on the pleadings it had not been shown that the respondent had become a trespasser. The appellant appealed to the Federal Court.

Held: (1) the learned judge in the High Court was not correct in saying that no cause of action had arisen;

(2) on the facts of this case, the respondent's father was only a licensee when the house on the land was originally built and this contractual licence was terminated when he died;

(3) even assuming that the respondent's father acquired some sort of equity under the agreement with the son of the deceased owner, the appellant as purchaser without notice of the equity was not bound by it;

(4) in the circumstances the order for vacant possession should be restored.

Cases referred to:-

(1) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, 170.
(2) *Hodgkins & Anor.* v. *Hickson* (1878) 39 L.T. 644.
(3) *Doe d. James Aslin* v. *Summersett* (1830) 1 B. Ad. 136; 109 E.R. 738.
(4) *Errington* v. *Errington and Woods* [1952] 1 K.B. 290, 296.
(5) *Thomas* v. *Sorrell* (1673) Vang. 351; [1558-1793] All E.R. Rep. 107.
(6) *Doe* v. *Chamberlaine* (1839) 5 M. & W. 14, 16.
(7) *Lynes* v. *Snaith* [1899] 1 Q.B. 486.
(8) *Peakin* v. *Peakin* [1895] 2 I.R. 359.
(9) *Howard* v. *Shaw* (1841) 8 M. & W. 118

FEDERAL COURT.

D.P. Vijendran for the appellants.

R.R. Chelliah for the respondents

Gill C.J. (Malaya): This appeal arises from an action in the Sessions Court at Kuala Lumpur between the appellant, Kalimuthu alias Papa d/o Marimuthu, as plaintiff and the respondent, S. Kandiah, as defendant. The plaintiff's claim against the defendant was for recovery of vacant possession of house known as No. 36A-2 Jalan Langgok, Bukit Setapak, Kuala Lumpur.

The house in question was built in 1954 or 1955 by the defendant's father, M. Subramaniam, at his own expense on a portion of the land held under Certificate of Title No. 4284 for Lot 2 section 6, Setapak, Kuala Lumpur with the consent and approval of one Maros bin Malim Suleiman who was the then owner of the land, apparently on the understanding that Subramaniam was to pay Maros a monthly sum of $28 by way of ground rent and assessment. Maros